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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 81

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

JOHN P. McELROY, ET AL.

No. 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, PETITIONER

v.

JOHN P. McELROY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 14, 1968, inviting the Solicitor General to express the views of the United States with respect to these cases.

OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals is reported at 392 F. 2d 966.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1968. The petition for a writ of certiorari in No. 81 was filed on May 10, 1968, and in No. 128 on May 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether members of the Brotherhood of Locomotive Firemen and Enginemen who work both as locomotive firemen and locomotive engineers may designate their union to represent them in grievance disputes which arise during their work as engineers, or whether they may be represented only by the Brotherhood of Locomotive Engineers, the collective bargaining agent which represents the engineers' craft under a collective bargaining agreement which provides that it alone may represent employees in grievance proceedings arising out of their work as engineers.

STATEMENT

The respondents, plaintiffs in the district court, are members of the Brotherhood of Locomotive Firemen and Enginemen ("Firemen's Union") and employees of the Terminal Railroad Association of St. Louis ("Terminal"). They have seniority status both as firemen and as engineers, and rotate between the two crafts depending upon Terminal's needs (Pet. App. 24–25).[1] While working as firemen, their collective bargaining representative is the Firemen's Union and

[1] "Pet. App." references are to the appendix to the petition in No. 128.

their rates of pay and working conditions are established by the contract between that union and Terminal. While working as engineers, their collective bargaining representative is the Brotherhood of Locomotive Engineers ("Engineers' Union"), and their rates of pay and working conditions are established by its contract with Terminal (Pet. App. 25). By virtue of Section 2, Eleventh (c), of the Railway Labor Act, 45 U.S.C. 152, Eleventh (c), they need not join the Engineers' Union to work as engineers, but may maintain single union membership in the Firemen's Union, as they have chosen to do.[2] Until recently, Terminal permitted that union to represent its members in all grievance or disciplinary problems arising out of their work, without regard to whether it was work as firemen or as engineers (Pet. App. 26).

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[2] In our opinion, this case does not involve the issue presented in *Birkholz* v. *Dirks*, 391 F. 2d 289 (C.A. 7), certiorari granted, October 14, 1968, No. 172, this Term, and *O'Connell* v. *Erie Lackawanna R. Co.*, 391 F. 2d 156 (C.A. 2), certiorari granted, October 14, 1968, No. 158, this Term. The question there is whether the effect of Section 2, Eleventh (c), must be limited to the classic situation, intercraft mobility in which two or more unions are bargaining agents for crafts or classes of employees on the same railroad, and one union then seeks to enforce a union shop agreement against members of the other unions who occasionally work in its craft. Both courts recognized that the intercraft mobility problem was the principal spur to enactment of Section 2, Eleventh (c), 391 F. 2d at 291, and 159, and see *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 489 ff., but refused so to limit its application in view of its broader language and legislative history. In the present case, the classic situation is present—plaintiffs are mobile between two crafts, each of which is represented in dealings with the employer by a different union—and therefore Section 2, Eleventh (c), must apply, whatever construction is given it in the pending cases.

On November 15, 1965, Terminal and the Engineers' Union entered into a collective bargaining agreement for the engineers' craft; it provided, *inter alia,* that only the Engineers' Union could represent Terminal's employees in grievance and disciplinary matters arising out of their work as locomotive engineers. Subsequently, a number of the respondents wished to file grievances concerning the amount and rate of pay applicable to time they worked as engineers (Pet. App. 25), and designated the Firemen's Union to represent them in the processing of these claims. Terminal's officials refused to deal with the Firemen's Union, on the ground that Terminal's agreement with the Engineers' Union precluded such representation (*ibid.*).

Respondents then brought this suit in the United States District Court for the Eastern District of Illinois seeking to have declared invalid, as violating the Railway Labor Act, 45 U.S.C. 151 *et seq.*, the provision of the agreement purporting to limit their right to designate the representative of their choice in grievance and disciplinary matters. The district court dismissed the action for want of jurisdiction (Pet. App. 21–23). The Court of Appeals for the Seventh Circuit reversed, holding that there was federal court jurisdiction and, on the merits, that the challenged provision was invalid because in conflict with the Railway Labor Act. Terminal and the Engineers' Union have each petitioned for a writ of certiorari to review this decision.

DISCUSSION

1. An initial question, not raised in the papers here, is whether the employees' claim to the privilege of choosing their own representative for the prosecution of grievance claims before their employer is appropriate for federal court resolution, or is a jurisdictional dispute between unions left by Congress to other tribunals. In general, this Court has found justiciability lacking where the question raised is one specifically reserved to the National Mediation Board, such as representation of employees for collective bargaining purposes, Section 2, Ninth, of the Act, 45 U.S.C. 152, Ninth, and union jurisdictional disputes related thereto. *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650; *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297; *General Committee* v. *Missouri-K.-T.R. Co.,* 320 U.S. 323. On the other hand, it has found to be justiciable a number of cases where individual employees sought to vindicate rights claimed to have been granted to them under the Act, yet limited by a collective bargaining agreement. See *Felter* v. *Southern Pacific Co.,* 359 U.S. 326, 327, n. 3; *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774; *Tunstall* v. *Brotherhood,* 323 U.S. 210, 213; *Steele* v. *L. & N. R. Co.,* 323 U.S. 192, 205–207. In the present case, individual employees are claiming a right under the Act to designate representatives of their choice for the purpose of prosecuting their grievance and disciplinary claims, so-called "minor disputes" that are not subject to National Mediation Board jurisdiction, see *infra.* Accordingly, their claims appear to be justiciable.

General Committee v. *Southern Pacific Co.*, 320 U.S. 338, is not inconsistent with this conclusion. In that case, too, the question was who would represent members of the Firemen's Union, working as engineers, in handling their grievance claims. There, however, the Firemen's Union and the Engineers' Union were the opposing parties in the suit, and the Court believed that each was seeking *exclusive* rights of representation, 320 U.S. at 343. Although the Court held that that action was not justiciable, it specifically left open the question "[w]hether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims," *id.* at 344. That question, we believe, was subsequently resolved by *Felter* and the other cited cases in favor of justiciability. Respondents' claim here is simply for the privilege of choice. Accordingly, this action cannot be characterized as a jurisdictional controversy and was correctly held to present a justiciable question.

2. The court of appeals correctly held that the different treatment in the Railway Labor Act of major and minor disputes authorizes employees to be represented in the latter by their own union even though that union could not represent them in major disputes.

In *Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, adhered to on rehearing, 327 U.S. 661, the Court considered employees' rights to representation in minor disputes, *i.e.*, in disputes involving grievances or the interpretation of agreements covering rates of pay,

rules or working conditions. In that case, the National Railroad Adjustment Board had ruled that a settlement between the collective bargaining representative and the carrier precluded individual employees from pursuing money claims against the carrier arising out of the interpretation of the collective bargaining contract, despite the assertion by the employees that the union had no authority to settle these claims on their behalf. This Court in *Elgin* pointed out that under the Railway Labor Act there is a sharp distinction between such "minor disputes" and "major disputes" concerning the formation of collective agreements setting rates of pay, rules and working conditions (325 U.S. at 722–728, 739–740). Under the Act, the latter may be resolved through "mediation and conciliation only, * * * under the auspices of the [National] Mediation Board" (*id.* at 727), and a single collective bargaining agent has the right to represent the entire craft or class of employees, 45 U.S.C. 152, Fourth, Ninth. However, Sections 2, Fourth, and 3, First(j), of the Act, 45 U.S.C. 152, Fourth, and 153, First(j), give the employees the right to appear personally in minor disputes (*id.* at 729–731), and these disputes are eventually resolved by compulsory arbitration before the Adjustment Board (*id.* at 727). These differences, and the fact that the collective interests of the majority may be opposed to the interests of the individual (see 325 U.S. at 736), led the Court to conclude that Congress had intended to preserve the individ-

ual's right to represent himself in grievance proceedings.[3]

Elgin involved the individual employees' right to represent himself in minor disputes, whereas here the issue is the employee's right to designate another—in fact, the union of which he is a member—to do so. However, the *Elgin* holding that the collective bargaining agent's exclusive right to represent employees in the craft extends only to major disputes and does not encompass minor disputes, is based upon the broad scheme of the Act and thus supports the decision here.

Each reference in the Act to the processing of minor disputes also refers to "representatives" which the employees concerned may designate. Sections 2, Second, Third, Fourth (Proviso), and Sixth, and 3, First (j), of the Act, 45 U.S.C. 152, Second, Third, Fourth (Proviso) and Sixth, and 153, First (j). The term "representative" is defined quite broadly in Section 1, Sixth, of the Act, 45 U.S.C. 151, Sixth, as

[3] The rehearing in *Elgin* was occasioned by a dispute as to the evidence required to show that a collective bargaining agent did or did not have authority to settle an employee's grievance claim under its contract, a matter not in issue here. In one respect, however, the Court's opinion on rehearing appears to have strengthened respondents' claim. Section 3, First (i), of the Act, 45 U.S.C. 153, First (i), provides that in preliminary stages, grievance disputes "shall be handled in the usual manner"; the Court understood this to embody a Congressional view that custom and usage were entitled to weight in considering representation questions arising out of grievance disputes. 327 U.S. at 663. As respondents point out, it has been customary for the Firemen's Union to represent its members in grievance disputes, whether they were working as engineers or firemen at the time.

"any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." The various references to employee representatives are then qualified in differing ways. The representative for major disputes is described in the main body of Section 2, Fourth, as one determined by the "majority of any craft." By contrast, the references to the representatives for the purpose of processing minor disputes are described in terms indicating an unfettered right of designation. For example, Section 2, Second, refers to a representative designated by the employees "interested in the dispute"; Section 2, Fourth (Proviso), to "local representatives of employees"; and Section 3, First (j), to "other representatives, as they may respectively elect."[4]

Indeed, this Court appears to have interpreted this last phrase to mean that at the ultimate stage of the grievance process, the binding determination by the Adjustment Board, employees can be represented by whomever they chose. *General Committee* v. *Southern Pacific Co., supra,* 320 U.S. at 343 and n. 3; *Elgin, J. & E. R. Co., supra,* 325 U.S. at 729 ff. Since employees can appoint representatives at earlier stages in the grievance process under the statute, they should be

[4] The legislative history of the 1934 amendments to the Act, which added the provisions here involved, contains little discussion of the right of representation in minor disputes. However, the hearings do reflect the understanding that, with respect to minor disputes, "the individual may in person or by counsel of his own choosing of [or ?] other representative, prosecute his grievances." Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 89; see also *id.* at 33, 44.

able to choose the same representative they could have before the Adjustment Board. This argument is strengthened here by two additional considerations: First, the choice the employees actually wish to make is one sanctioned by custom and usage, and hence within the reference of Section Three, First (i), to handling of minor disputes "in the usual manner." (See n. 3, p. 8, *supra.*) Second, the ruling the Engineers' Union seeks will reduce the value to respondents of their membership in the Firemen's Union and enhance the value of membership in the Engineers' Union. This encouragement to dual union membership, achieved by the Engineers' Union's control of collective bargaining for its craft, seems just the sort of pressure which it was the purpose of Section 2, Eleventh (c), to avoid.

3. The only authority on the issue involved here supports the decision of the court below. Two courts of appeals had already come to this result before *Elgin. General Committee* v. *Southern Pacific Co.*, 132 F. 2d 194, 199 (C.A. 9), reversed on jurisdictional grounds, 320 U.S. 338; *Estes* v. *Union Terminal Co.*, 89 F. 2d 768, 770 (C.A. 5) (dictum); see also *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R.*, Civil Action No. C–717 (D. Colo., September 9, 1968, appeal pending), following the Seventh Circuit's holding in this case. Shortly after *Elgin* was decided, the Attorney General issued an opinion upholding the employees' right freely to designate their representatives in the processing of minor disputes. 40 Op. A.G. 494.

Petitioners err in asserting that there is a conflict on the issue among the circuits. *Brooks* v. *Chicago, R.I. & P.R. Co.*, 177 F. 2d 385 (C.A. 8), was a reinstatement and back pay action; one of the grounds for error was the assertion that the employee was denied the right to counsel of his own race. The court held that it had no power to prescribe procedure for disciplinary hearings or to issue reinstatement orders; it went on to decide on the merits that "the fault of the appellant was the sole and efficient cause of the loss of his employment with the railroad * * *." 177 F. 2d at 391. Similarly, *Butler* v. *Thompson*, 192 F. 2d 831 (C.A. 8), involved an action for reinstatement and back pay, and held that there was no jurisdiction to entertain such an action. The employee there wished to be represented by a union of which he was not a member, and the court in dictum stated that a contract provision providing the contrary would govern. 192 F. 2d at 833. The *Elgin* case was not discussed in either *Butler* or *Brooks*.

Finally, cases involving the National Labor Relations Act (*e.g.*, *National Labor Relations Board* v. *I. Posner, Inc.*, 342 F. 2d 826 (C.A. 2), certiorari denied, 382 U.S. 837; *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69 (C.A. 5)) are not in point. Under that statute, the union and the employer can provide for any procedure they wish in handling minor disputes. See *Vaca* v. *Sipes*, 386 U.S. 171, 175 n. 3. The statute does not set up divergent procedures for major and minor disputes, as does the Railway Labor Act, and thus no need to protect the employees' right to designate representatives of their

choice for minor disputes is present. Nor is there apparent concern with preventing pressure toward dual union membership. Thus, the asserted conflict between the decision below and cases under the Labor Act is immaterial. See also, *Pennsylvania Railroad* v. *Rychlik, supra,* 352 U.S. 480, 493.

4. The Railway Labor Act was amended in 1966 by P.L. 89–456 to establish a new procedure for the processing of minor disputes. Any carrier or carrier group, or "any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter," may request the convening of a special adjustment board as an alternative to proceedings before the National Railroad Adjustment Board; this special board is to be composed of one member designated by the carrier(s), one member designated by "the representative of any craft or class of employees of such carrier," and, if necessary, a neutral agreed upon by the representatives or designated by the National Mediation Board. Section 3, Second, of the Act, as amended, 45 U.S.C. 153, Second (Supp. III). In opposing the amendments during hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, both railroad and union representatives remarked that they appeared to upset the existing accommodation regarding grievance resolution, in which employees in an intercraft mobility situation were represented by the union to which they belonged, whether or not it was the representative of the craft regarding which the dispute arose. Under the amendments, the spokesmen

feared, only the craft union would be able to demand a special board; others would be left to the more cumbersome processes of the Adjustment Board, creating pressure for a closed shop in each craft, and numerous jurisdictional disputes.[5]

For the purpose of this case, which arose before the amendments went into effect, one can regard this history as demonstrating the "usual manner" in which minor disputes have been settled, and apparent acceptance of the notion that discriminatory access to the grievance-settling process would raise the problem of pressure toward dual union membership which Section 2, Eleventh (c), seeks to avoid. Whether the amendments do create a preferential status for craft representatives in the future is itself an open question. In *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R., supra,* p. 10, the district court found that the sole purpose of the legislation was to alleviate the backlog of cases before the Adjustment Board (see S. Rep. No. 1201, 89th Cong., 2d Sess., p. 2); to avoid conflict with Section 2, Eleventh (c), it interpreted the references in the amendments to "craft" or "class" representatives as being to *any* craft or class representative having an agreement with the employer, and not necessarily the craft or class in which the employee was working at the time the dispute arose. The meaning of the 1966 amendments is not in issue in this

[5] Hearings on H.R. 701, 704, and 706, Railway Labor Act Amendments Relating to NRAB, before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., pp. 199–200, 203–204, 218, 230.

case however; what is important here is that they do not foreclose the interpretation adopted by the Seventh Circuit.

In sum, the decision of the Seventh Circuit is correct, and there is no conflict among the circuits or other reason for further review. As this Court said with respect to another individual right protected by Section 2, Eleventh (b), of the Act, 45 U.S.C. 152, Eleventh (b), "Congress was specifically concerned with keeping these areas of individual choice off the bargaining table." *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 333. Similarly, in the instant cases, the individual employee's right to choose a representative in minor disputes should not be abridged by an agreement between his employer and a union to which he does not belong and which he is not required to join.[6]

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1968.

[6] Nothing in the decision of the Seventh Circuit indicates that the Engineers' Union will be foreclosed from prosecuting its interest in interpretation of the collective agreement in proceedings concerning grievances that arose while the employees were working as engineers. Cf. *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R.*, *supra*, p. 10.

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